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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)	IN EQUITY NO. C-125-ECR
)	Subproceeding: C-125-B
Plaintiff,)	
)	3:73-CV-00127-ECR-WGC
WALKER RIVER PAIUTE TRIBE,)	
)	
Plaintiff-Intervenor,)	
)	
v.)	JOINT REPORT OF CERTAIN
)	DEFENDANT PARTIES
WALKER RIVER IRRIGATION DISTRICT,)	
a corporation, et al.,)	
)	
Defendants.)	
_____)	
UNITED STATES OF AMERICA,)	
WALKER RIVER PAIUTE TRIBE,)	
)	
Counterclaimants,)	
)	
v.)	
)	
WALKER RIVER IRRIGATION DISTRICT,)	
et al.,)	
)	
Counterdefendants.)	
_____)	

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I. INTRODUCTION.

This Joint Report is submitted pursuant to and for the purposes set forth in the Order of the Magistrate Judge of December 23, 2011 (Doc. #1675), the subsequent Stipulation and Order of January 10, 2012 (Doc. #1680), and the Order of January 10, 2012 (Doc. #1681).¹

This Joint Report is submitted on behalf of the Walker River Irrigation District (the “District”), the Nevada Department of Wildlife, Lyon County, Nevada, Mono County, California, Circle Bar N Ranch, LLC, Mica Farms, LLC, and Joseph and Beverly Landolt.²

II. OVERVIEW AND HISTORY OF THIS PROCEEDING.

A. Overview.

In this subproceeding, the Walker River Paiute Tribe (the “Tribe”) and the United States seek recognition of a right to store water in Weber Reservoir for use on the Walker River Indian Reservation. Weber Reservoir is located on the Reservation. Construction of a storage reservoir for purposes of irrigating land on the Walker River Indian Reservation was suggested and considered by the United States at least as early as 1900. The Weber Reservoir site itself was investigated some years prior to 1926. Congress expressly authorized further study by an Act approved June 30, 1926, Public Law No. 422, 69th Congress, S 2826. A detailed report on storage for the Reservation was submitted by the Department of the Interior to Congress in December 1926 (the “Blomgren Report”). Some of this happened before the Walker River Action was filed, and much of it happened while that action was in its initial stages, and before a judgment was entered.

¹ Identical Minute Orders and Stipulations and Orders were entered in proceeding C-125 (Doc. #s 1047; 1049; 1051) and in subproceeding C-125-C (Doc. #s 567; 571; 572).

² These Defendant Parties have elected to file separate Joint Reports in each of the proceedings for two primary reasons. First, the subjects to be covered by the reports involve different matters in each, although there are some similar issues in the two subproceedings. Second, one of the purposes for establishing separate files was to avoid burdening this file with material related to the other matters.

1 Because there is no recognized water right for Weber Reservoir, the Tribe and the
2 United States each claim a right to store 13,000 acre feet of water in Weber Reservoir, plus
3 evaporation and seepage, with a priority date of April 15, 1936. The United States asserts that
4 Weber Reservoir was practically completed in 1935, and the Tribe alleges that portions of the
5 Reservoir were completed in 1935. Both allege that through the use of Weber Reservoir for the
6 storage of water, the Tribe may irrigate more land than the 2,100 acres for which a water right
7 was recognized in the Walker River Action.
8

9 Neither the United States, nor the Tribe, differentiates between the use of water stored
10 in Weber Reservoir to irrigate lands which were part of the Reservation when the Walker River
11 Decree was entered, and lands added to the Reservation thereafter (the “Added Lands”). They
12 also do not differentiate between use of Weber Reservoir to “regulate” the direct diversion
13 surface water right recognized in the Walker River Decree and to “conserve” water over and
14 above that recognized water right.³ They also seek a federal reserved water right for the
15 167,460 acres of Added Lands. These claims are in addition to the direct flow rights awarded
16 to the United States for the benefit of the Tribe in the Walker River Decree. These claims are
17 made against both surface water from the Walker River and underground water.
18

19 The United States also makes additional claims to surface water and underground water
20 in the Walker River Basin for the Hawthorne Army Ammunition Plant, the Toiyabe National
21 Forest, the Mountain Warfare Training Center of the United States Marine Corps, and the
22 Bureau of Land Management. It also advances claims for surface and underground water for
23 the Yerington Reservation, the Bridgeport Paiute Indian Colony, and several individual Indian
24 allotments.
25

26
27
28 ³ “Regulation” would involve no additional water beyond that recognized by the Walker River
Decree. “Conservation storage” would involve water over and above the water right
recognized by the Walker River Decree.

1 This subproceeding began with filings in May of 1992. Since that time, the proceedings
2 in this matter have primarily involved joinder and service of necessary parties, consideration of
3 how a case of this magnitude should be managed and briefing on “threshold issues.” In
4 addition, for a period from mid-2003 through late 2006, some of the parties participated in a
5 facilitated mediation process in an effort to resolve the claims being made in this matter.
6

7 **B. History of This Subproceeding.**

8 **1. The Petition of the Walker River Irrigation District.**

9 The history of this subproceeding begins with the filing of a petition by the District on
10 January 9, 1991, for Declaratory and Injunctive Relief; Request for Order to Show Cause; or in
11 the Alternative to Change the Point of Diversion against the California State Water Resources
12 Control Board and its members (the “District Petition”). The District Petition was designated
13 Subfile No. C-125-A.

14 The only named respondents to the District Petition were the California State Water
15 Resources Control Board and its individual members. The District Petition involved three
16 orders issued by the California State Water Resources Control Board with respect to water
17 rights licenses for Bridgeport and Topaz Reservoirs. The District contended that those orders
18 were contrary to and inconsistent with the Walker River Decree, and sought a declaration from
19 the Court to that effect. It also sought a declaration that the respondents lacked the power to
20 enter and enforce orders which were contrary to, inconsistent with and interfered with the
21 administration of the Walker River Decree and which the District alleged interfered with the
22 jurisdiction of the Court administering the Walker River Decree. The District sought an
23 injunction permanently enjoining the Board and its members from enforcing those portions of
24 the orders which the Court found inconsistent with and contrary to the Walker River Decree or
25 interfere with the jurisdiction of the Court. That matter was eventually resolved by Stipulation
26 and Order on June 3, 1996.

27 **2. The Original Counterclaims in This Subproceeding.**

28 Before the District Petition was resolved, the Tribe in May, 1992, served an answer,
counterclaim and cross-claim in response to it. Doc. #1. The United States subsequently filed

1 a Motion for Leave to File Counterclaim. Doc. #3. The Counterclaims sought recognition of a
2 right to store water in Weber Reservoir for use on lands of the Walker River Indian
3 Reservation, and of a federal reserved water right to use water on lands added to the
4 Reservation in 1936. These claimed rights were alleged to be in addition to the right awarded
5 to the United States for the benefit of the Reservation by the Walker River Decree. All water
6 users on the Walker River and its tributaries were alleged to be counterdefendants, although at
7 that time they were not individually named, identified or served. *See*, Doc. #s 1; 3.

8 **3. The Motions to Dismiss.**

9 On or about August 3, 1992, the District moved to dismiss the counterclaims. Doc. #5.
10 Alternatively, the District moved to require the Tribe and the United States to join all claimants
11 to the water of the Walker River as defendants in the action and to serve them in accordance
12 with Fed. R. Civ. P. 4. Doc. #5. The State of Nevada filed motions similar to the District's
13 motions. Doc. #6.

14 On October 27, 1992, the Court denied the Motion to Dismiss, and allowed the Tribe's
15 and United States' counterclaims to be filed as "cross-claims." The Court granted the motions
16 to require joinder and service of process in accordance with Rule 4 on all claimants to the
17 waters of the Walker River and its tributaries. Doc. #15. Subsequent to that order, the parties
18 stipulated to and the Court granted the Tribe and the United States from February 23, 1993
19 through November 9, 1998 to join the additional parties and complete service of process. *See*,
20 Doc. #s 20; 21; 25; 36; 37; 48; 49; 52; 54; 55; 60; 61; 63.

21 **4. The Motion for Instructions.**

22 In mid-1994, the United States asked the Court whether its order of October 27, 1992
23 (Doc. #15) requiring that "all claimants to the water of Walker River and its tributaries must be
24 joined as parties to the [Tribe's counterclaim]" extended to groundwater claimants and users in
25 the Walker River Basin. Doc. #23. In its Motion for Instructions, the United States took no
26 position, but merely indicated its need for clarification. Subsequently, the Tribe in its Response
27 (Doc. #26) took the position that groundwater claimants must be joined as necessary parties
28 pursuant to Fed. R. Civ. P. 19. Thereafter, the United States in its Reply abandoned its neutral
posture, and also took the position that groundwater claimants in the Walker River Basin must

1 be joined as necessary parties. Doc. #29. The Court determined that its prior order did not
 2 require joinder of groundwater claimants, and affirmatively denied the request to join such
 3 claimants. Doc. #30.

4 **5. The Amended Counterclaims.**

5 On July 31, 1997, the Tribe filed its First Amended Counterclaim (“Tribe’s First
 6 Amended Counterclaim”). Doc. #58. In addition to the surface water claims as set forth in its
 7 Original Counterclaim, the Tribe’s First Amended Counterclaim added claims to groundwater
 8 for the Reservation. The Tribe’s claims to water for the Added Lands (land added to the
 9 Reservation in 1936) and for groundwater are based upon the federal implied reservation of
 10 water doctrine. *See* Doc. #58 at paras. 2-3.

11 The United States filed the First Amended Counterclaim of the United States of
 12 America (“United States’ First Amended Counterclaim”). Doc. #59. The First, Second and
 13 Third Claims of the United States allege claims identical to the claims asserted in the Tribe’s
 14 First Amended Counterclaim. In addition to the claims for the Walker River Indian
 15 Reservation, the United States’ First Amended Counterclaim includes several additional claims
 16 to surface water and groundwater for other federal lands in the Walker River Basin.

17 The Fourth Claim for Relief seeks “federal reserved water rights” to surface and
 18 groundwater for lands which form the Yerington Paiute Tribe Reservation. Doc. #59. It also
 19 seeks a “declaration and confirmation” of water rights held under state law. *Id.* at paras. 28-29.
 20 The Fifth Claim seeks “federal reserved rights” to surface and groundwater for the Bridgeport
 21 Indian Colony, as well as rights based upon California law. *Id.* at paras. 28-29. The Sixth
 22 Claim asserts “federal reserved water rights” to surface and groundwater for the Garrison and
 23 Cluette Allotments, as well as rights based upon California law. *Id.* at paras. 34-35. The
 24 Seventh Claim asserts “federal reserved water rights” to surface and groundwater claims for 55
 25 individual allotments. *Id.* at para. 39.

26 The Eighth through Eleventh Claims for Relief include claims for the Hawthorne Army
 27 Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center of the
 28 United States Marine Corps, and the Bureau of Land Management. All seek rights to surface
 and groundwater. *See*, Doc. #59 at paras. 46; 51; 56-62; 65; 66; 70-73.

None of the issues related to the merits of any of the claims asserted in the Amended Counterclaims have been addressed. They all remain to be determined.

6. The Motion to Serve the Amended Counterclaims and to Join Groundwater Users.

On August 20, 1998, the United States and the Tribe filed their Joint Motion for Leave to Serve First Amended Counterclaims, to Join Groundwater Users, to Approve Forms for Notice and Waiver and for Service of Pleadings Once Parties Are Joined. Doc. #62. That Motion prompted a number of responses and other filings (Doc. #s 63-82) spanning a period from August, 1998 to May, 1999. On May 11, 1999, the Court entered an order setting a Scheduling and Planning Conference to address a number of issues related to joinder of groundwater users and other issues related to placing the “case on some sort of proper procedural track.” Doc. #81. That scheduling and planning conference took place by telephone on May 21, 1999. As a result of that conference, the Court ordered:

[T]he parties will have forty-five (45) days from this date within which to submit a stipulation, or if a stipulation cannot be reached, then a statement of the issues on which there is agreement and the issues which are disputed with respect to planning and scheduling according to the order of the Court of May 11, 1999, and any matters that are related to the issues and problems referred to in that order.

Doc. #83. The Court indicated, however, that the 45 day period was flexible, and the Court would allow additional time, if necessary. *Id.*

After diligently attempting to reach consensus on the scheduling and planning issues, the parties determined that they were unable to reach agreement. On December 15, 1999, the parties submitted a joint report to the Court seeking the Court’s assistance in determining the best way to proceed to address the issues raised in the First Amended Counterclaims. To that end, the parties agreed that they should submit their respective proposals for the future management of this proceeding by way of motion. The parties stipulated and agreed to a schedule for submission of their respective motions. The Court entered an order approving that stipulation on December 16, 1999. Doc. #89.

7. The Case Management Order.

That briefing (Doc. #s 96-106) resulted in the entry of the Case Management Order (“CMO”) on April 19, 2008. Doc. #108. The CMO is the single most important document in

1 this matter with respect to identifying issues in this proceeding which are within the jurisdiction
 2 of the Magistrate Judge and which must be managed and decided for this matter to proceed on
 3 the merits. This Joint Report provides a summary of the CMO.

4 **a. Bifurcation of the Tribal and Federal Claims.**

5 The CMO recognizes that the case as a whole is simply too big and too complex to
 6 process on a reasonable basis without bifurcation and other management. It, therefore,
 7 bifurcates the claims of the Tribe and United States for the Walker River Indian Reservation
 8 (the "Tribal Claims") from all of the other claims raised by the United States (the "Federal
 9 Claims"). Doc. #108 at 2-4. Except as expressly provided in the CMO, all discovery and other
 10 proceedings in the action are stayed. *Id.* at 4, lns. 20-24.

11 The CMO divides the proceedings concerning the Tribal Claims into two phases. Phase
 12 I will consist of "threshold issues as identified and determined by the Magistrate Judge." Phase
 13 II will "involve completion and determination on the merits of all matters relating to [the]
 14 Tribal Claims." Doc. #108 at 11, lns. 11-18. Additional phases of the proceedings will
 15 "encompass all remaining issues in the case." *Id.*, pg. 11, lns. 25-26.

16 **b. Persons to Be Joined and Served.**

17 The CMO also identified by category of water right the persons and entities who must
 18 be joined and served for the Amended Counterclaims to proceed. Doc. #108 at 3, ln. 3 - 4, ln.
 19 3. The CMO identifies two categories of holders of surface water rights, and seven categories
 20 of holders of groundwater rights to be joined and served. *Id.* at 5-6. The Magistrate Judge was
 21 given the authority to modify those categories. *Id.* at 3, lns. 9-11. To date, there has been no
 22 such modification.

23 The details with respect to service of process were left to the Magistrate Judge. *See*,
 24 Doc. #108 at 6-8. Among other things, those details include provision of information
 25 concerning the identity of persons and entities to be served. *Id.* at 7, lns. 10-19. They include
 26 information regarding changes or modifications in those individuals and entities. *Id.* at 7, ln. 21
 27 - 8, ln. 2. Consistent with the CMO, the active parties in this subproceeding, through briefing,
 28

argument and agreement and with the assistance of the Magistrate Judge, have addressed many of those details. *See, e.g.*, Doc. #s 206; 207.

c. Responses to Process.

The CMO also addresses the required response to process. Persons and entities who have been served or who have waived service are required to file and serve a Notice of Appearance and Intent to Participate in the litigation. Doc. #108 at 12, lns. 17-22. They may, but are not required to, identify an attorney in that Notice of Appearance. *Id.* It is estimated that there are approximately 2,200 persons and entities who have appeared, but who are not represented by counsel.

The CMO expressly provides that no answers or other pleading will be required except upon further order of the Magistrate Judge. It also provides that no default shall be taken for failure to appear. *Id.* at 12, lns. 22-25.

d. Scheduling and Case Management.

The CMO also directs the Magistrate Judge to receive recommendations from the parties for procedures for scheduling and efficient management of the litigation given the number of parties to the case. By way of example, the CMO refers to special procedures for service of pleadings. Doc. #108 at 8, lns. 18 - 9, ln. 2.

e. Threshold Issues Relative to the Tribal Claims.

As noted above, the CMO provides that pretrial proceedings regarding the Tribal Claims be conducted in two phases, with the first phase to consist of the “threshold issues.” Through the threshold issue phase, the CMO seeks to further manage the Tribal Claims in ways which may defer costly and possibly unnecessary proceedings in the interests of judicial economy and the convenience of the parties. The CMO includes suggestions for threshold issues which do not preclude consideration of other issues. *See* Doc. #108 at 9, ln. 3 - 11, ln. 9. Included among the possible threshold issues to be considered for inclusion by the Magistrate

1 Judge are issues related to the Court's jurisdiction and equitable defenses to the Tribal Claims.

2 *Id.*

3 The identification of threshold issues is left to the Magistrate Judge, and those issues
4 shall "not be finally resolved and settled by the Magistrate Judge until all appropriate parties
5 are joined." Doc. #108 at 9. However, the CMO provides that through appropriate notice to
6 the parties then appearing in the case, the Magistrate Judge should consider and make a
7 "preliminary determination of the threshold issues to be determined at the outset of the
8 litigation." Doc. #108 at 9. The parties were to identify all potential issues promptly, and
9 submit them to consideration of the Magistrate Judge so that the action could proceed promptly
10 upon the conclusion of service of process. *Id.*

12 **f. Discovery, Motions and Further Proceedings.**

13 The CMO also directs the procedures to be followed in connection with the disposition
14 of the threshold issues. First, it allows for discovery on those issues. Second, it allows for
15 written discovery concerning the basis for the Tribal Claims. It stays all other discovery. Doc.
16 #108 at 13, Ins. 4-15. It provides for disposition of the threshold issues by motion, evidentiary
17 hearing, or both. *Id.*, pg. 13, ln. 16 - pg. 14, ln. 2. The CMO recognizes that defenses to the
18 Tribal Claims may be the same or similar to defenses to the Federal Claims. Doc. #108 at 2,
19 Ins. 17-24. Thus, it is possible that the scope of the litigation of the Federal Claims may narrow
20 as a result of determinations of related threshold issues.

23 **8. Service and Activities During Service.**

24 The United States and Tribe began service in the summer of 2003. In addition, in the
25 spring of 2003, a number of the principal parties involved in this subproceeding and in the C-
26 125-C subproceeding agreed to participate in a mediation process to attempt to settle certain
27 issues in the litigation. As a result, the Court entered an Order Governing Mediation Process
28 on May 27, 2003 (the "Mediation Order"). Doc. #199. The Mediation Order provided that
service of process should continue and be completed as soon as possible during the Mediation.

1 However, all other proceedings were held in abeyance during the Mediation. Doc. #199 at 2-3.
2 On December 8, 2006, those parties reported that the Mediation Process had ended. *See* Doc.
3 #144. However, during that period, the United States and the Tribe had continued service in
4 phases. Through December 31, 2008, the United States filed fourteen Reports Concerning the
5 Status of Service. *See* Doc. #s 266; 481; 497; 513; 649; 740; 802; 838; 1035; 1126; 1178;
6 1269; 1316; 1479.

7 After the Mediation Process ended, the Magistrate Judge began to address the threshold
8 issues as provided by the CMO. On August 20, 2007, the Court directed the parties to
9 exchange proposed threshold issues. Doc. #1221. A number of parties submitted “preliminary
10 legal theories” in late December, 2007 and early January, 2008. *See* Doc. #s 1279; 1280; 1285;
11 1287; 1288; 1289; 1290. On July 25, 2008, the Magistrate Judge ordered the parties to submit
12 briefs on what issues should be identified as threshold issues as required by the CMO. Doc.
13 #1381. Thereafter, opening, responsive and reply briefs were filed as ordered. *See* Doc. #s
14 1411-1419; 1430; 1441-1445; 1452-1455.

15 At a December 3, 2008 Status Conference, the Magistrate Judge also ordered the filing
16 of briefs on the question of whether, and, if so, when answers should be filed. Doc. #1468.
17 Those briefs were subsequently filed. Doc. #s 1487; 1498; 1499; 1500; 1501; 1503.

18 Thereafter, on March 12, 2009, Magistrate Judge McQuaid recused himself from this
19 matter. Doc. #1510. A previously scheduled status conference was vacated (Doc. #1512), and
20 the matter was assigned to Magistrate Judge Leavitt. Doc. #1511.

21 On March 5, 2010, the United States submitted its Fifteenth Report on the Status of
22 Service. Doc. #1528. By order dated September 20, 2010, the Magistrate Judge set a
23 telephonic status conference in this matter for October 19, 2010. Doc. #1598. As a result of
24 that status conference and subsequent stipulations and orders, a schedule was established for
25 submission of and briefing with respect to an order concerning the status of service (the
26 “Service Cut-Off Order”) and an order related to the status and obligations of existing
27 defendants that transfer water rights subsequent to appearing or being served, and procedures to
28 address issues related to their successors and their substitution and/or Joinder (the “Successor-
In-Interest Order”). Doc. #s 1610; 1612; 1615-1617.

1 The proposed Service Cut-Off Order and Successor-In-Interest Order were lodged with
2 the Court. Doc. #s 1613; 1614. Objections were filed and briefed. Doc. #s 1621; 1623.
3 Thereafter, on August 24, 2011, the Magistrate Judge entered the Successor-In-Interest Order.
4 Doc. #1649. On August 26, 2011, the Magistrate Judge entered an Amended Successor-In-
5 Interest Order. Doc. #1650. On September 19, 2011, the Magistrate Judge entered the Service
6 Cut-Off Order. Doc. #1656. The District has objected to the Rulings of the Magistrate Judge.
7 Doc. #s 1652; 1653; 1654; 1663; 1664; 1665. Those objections have been opposed (Doc. #s
8 1674; 1673). A hearing on those objections is scheduled for February 21, 2012. Doc. # 1682.

9 **III. PRIMARY ISSUES PRESENTED BY AND REMAINING IN THIS CASE.**

10 **A. Introduction.**

11 All of the issues related to the merits of the claims asserted in the Amended
12 Counterclaims remain to be litigated. As summarized above, the CMO provides considerable
13 direction to the Magistrate Judge concerning pretrial issues within his jurisdiction which remain
14 and must eventually be decided. Some of those issues are presently the subject of the
15 Objections of the District to the Successor-In-Interest Order and the Service Cut-Off Order.
16 Others of those issues have been briefed, but not decided by the Magistrate Judge. Still others
17 have not yet been presented to the Magistrate Judge.

18 In this portion of the Joint Report, we attempt to identify those issues so that they can be
19 appropriately scheduled for briefing, argument and/or decision. We recognize that the purpose
20 of this report and the status conference of February 6, 2012 is not to make decisions on issues,
21 for example, to preliminarily or finally decide a list of threshold issues, but rather to identify
22 issues so that an appropriate schedule for and decisions on them can be established. Again,
23 using the threshold issues as an example, the positions of the parties have been briefed, and are
24 fairly divergent. There is no benefit to attempting to restate all of those issues and all of that
25 briefing in this Joint Report.

26 **B. Notice to Unrepresented Parties.**

27 As noted above, the CMO provides that the Magistrate Judge is to receive
28 recommendations of the parties for procedures for scheduling and for the efficient management
of this litigation given the number of parties to the case. Such procedures may include the use
of common counsel, special procedures for service of pleadings, or any other mechanisms

1 deemed likely to reduce the burdens on the parties and the Court in a case of this magnitude.
2 There are, at the present time, approximately 2,200 persons and entities served in this matter
3 who are not represented by counsel.

4 In order to move forward with a preliminary and final determination of threshold issues,
5 and for the disposition of threshold issues, it will be necessary to have in place an effective and
6 efficient method for the Court, as well as the parties, to serve notices, orders, motions, points
7 and authorities, and other materials on parties who are not represented by counsel. The same is
8 true with respect to any necessary service of the Amended Successor-In-Interest Order once a
9 decision is made on the objections to it. It is also true with respect to notice of all future
10 proceedings in this matter, including the need for answers, should answers be ordered. *See* pgs.
11 17-18 below. The Magistrate Judge should establish a schedule for recommendations from the
12 parties for procedures for providing notice to those unrepresented parties, and service of
13 pleadings on those parties in a manner which is consistent with the Federal Rules of Civil
14 Procedure, and due process.

15 **C. Issues Which Are Presently the Subject of Objections to the Successor-In-Interest and Service Cut-Off Orders.**

16 The duties and obligations of the parties to join or substitute successors-in-interest to
17 persons or entities previously served with process in this matter are the subject of the matters
18 presently before the District Judge based on the District's Objections to the Magistrate's
19 rulings. The obligation to provide information related to the identification of such successors-
20 in-interest is also before the District Judge on those Objections. Once those objections are
21 decided, a determination should be made as to what, if any, matters need to be considered by
22 the Magistrate Judge as a result of the decision.

23 **D. Preliminary and Final Determination of Threshold Issues.**

24 As noted above, with respect to the threshold issues, the parties submitted preliminary
25 legal theories in late December, 2007 and early 2008. The docket numbers for those
26 submissions are 1279; 1280; 1285; 1287; 1288; 1289; 1290. Later in 2008, the Magistrate
27 Judge ordered the parties to submit briefs on what issues should be identified as threshold
28 issues. The parties filed opening, responsive and reply briefs. Those filings are docket
numbers 1411-1419; 1430; 1441-1445; 1452-1455.

1 As the Magistrate Judge will see from reviewing the preliminary legal theory briefs and
2 the briefs on threshold issues, the parties have divergent views on what the threshold issues
3 should be. Proposed threshold issues involve issues related to the Court's subject matter
4 jurisdiction, issues related to affirmative defenses, issues related to elements essential to the
5 claims being made by the Tribe and the United States, and the timing of consideration, and the
6 order of consideration of threshold issues. There are also issues concerning discovery and the
7 extent of discovery related to such threshold issues. There are also some issues related to
8 service, including service by publication. The Governmental defendants, like the California
9 Agencies, have some unique issues concerning threshold issues. *See, e.g.*, Doc. #930; 1283;
10 1417.

11 Subject to any request the Magistrate Judge may have for additional briefing on
12 identification of threshold issues, in our judgment, it is appropriate to now make a preliminary
13 determination of the threshold issues as provided in the CMO. To the extent that the
14 Magistrate Judge requires argument, such argument can be scheduled. However, under the
15 CMO, parties presently appearing in this matter are to be notified of the preliminary
16 consideration of threshold issues. Doc. #108 at 9, lns. 4-9.

17 Although it is, to a certain extent, related to the Objections to the Amended Service Cut-
18 Off Order presently before the Court, it does appear that the parties are in agreement that
19 service of process and joinder is sufficiently complete for the Magistrate Judge to also make a
20 final determination of threshold issues. However, the procedures for notice to those persons
21 who are not represented in this matter, as referenced above, also need to be in place so that
22 those persons are aware of, and if they elect to do so, can participate in the process for that
23 final determination.

24 **E. Answers.**

25 As noted, the Magistrate Judge McQuaid also ordered briefing on the question of
26 whether, and, if so, when, answers should be filed. Briefs on that issue were subsequently
27 filed. *See* Doc. #s 1487; 1498; 1499; 1500; 1501; 1503. Because of the relationship between
28 that issue and what the Court may determine to be the final list of threshold issues,
consideration of this question should take place at the same time as the Court is considering

1 how to proceed with a final determination of threshold issues. Again, if answers are to be
 2 required, unrepresented persons need to be notified and given time to submit and prepare them.

3 **F. Procedures Following Identification of Threshold Issues.**

4 Until the list of threshold issues is final, implementation of the procedures in the CMO
 5 related to their disposition need not be implemented. Doc. #108 at 13. However, once that list
 6 is finally determined, then consideration needs to be given to discovery with respect to them.

7 On completion of discovery, the CMO authorizes motions which may be dispositive or
 8 partially dispositive of any threshold issue. Doc. #108 at 13, Ins. 16-018. The Magistrate
 9 Judge is to set the time period and schedules for such dispositive or partially dispositive
 10 motions. However, those motions are to be decided by the District Judge. *Id.* at Ins. 19-22.
 11 Finally, the CMO expressly provides that if the threshold issues are not resolved by motions, an
 12 evidentiary hearing shall be held before the District Judge at such time and according to such
 13 conditions (including, as appropriate, the filing of joint prehearing orders as shall be
 14 determined by the Magistrate Judge). *Id.* at 13, ln. 23 - pg. 14, ln. 22.

15 At this point, nothing needs to be done with respect to those matters, except to be aware
 16 that they will come up eventually.

17 **IV. MATTERS OF LEGAL OR FACTUAL IMPORTANCE WITHIN THE
 18 MAGISTRATE'S JURISDICTION.**

19 These Defendant Parties have attempted to identify issues and matters which they
 20 believe are most significant at this time. Other issues will no doubt arise. However, these
 21 parties are not aware of any other matter not set forth above, of legal or factual importance,
 22 related to this matter and within the jurisdiction of a United States Magistrate Judge under 28
 23 U.S.C. § 636(b)(1) which is pending at the present time.

24 Dated: January 23, 2012

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CERTIFICATE OF SERVICE

I certify that I am an employee of Woodburn and Wedge and that on the 23rd day of January, 2012, I electronically served the foregoing *Joint Report of Certain Defendant Parties* in Case No. 3:73-cv-0127-ECR-WGC with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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I certify that I am an employee of Woodburn and Wedge and that on the 23rd day of January, 2012, I electronically served the foregoing in Case No. 3:73-cv-0128-ECR-WGC with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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